UNITED STATES OF AMERICA

SUPREME COURT

CORAL W. DUKE, doing business as Duke Cartage Company,
Plaintiff and Appellee,
vs.
MICHIGAN PUBLIC UTILITIES COMMISSION, et als.,
Defendants and Appellants.

REPLY BRIEF FOR APPELLANTS

Both in this case, and in the Liberty Highway Company case, argued on application for an injunction at the same time, multifarious questions were raised involving the constitutionality of the entire statute (Act No. 209 of the Michigan Public Acts of 1923), but the act was sustained except sections 3 and 7. The injunction was denied in the Liberty Highway case, and was granted in the case at bar. The entire discussion of the general validity of the act and the principal discussion of the questions on sections 3 and 7 are in the opinion in the Liberty Highway case, (reported 294 Fed. R. 703) which, by stipulation is included in the record (R. p. 29).

Our original brief dealt only with the questions arising on sections 3 and 7 of the Act. Appellee's brief is

almost entirely devoted to propositions going to the general constitutionality of the Act.

The first proposition, however, (Appellee's brief, p. 2) is that aside from constitutional questions, the injunction was granted in the exercise of the court's discretion, and should not be disturbed upon appeal.

I.

In discussing this point, Appellee's counsel claims (Brief, p. 2) that the answer of the State (that is, of the defendants other than defendant Railroad Company) admits that the Act in question does not apply to private carriers, which is true (see our original brief, p. 36). But Appellee ignores the fact that the answer of the defendant Railroad Company (R. p. 27) averred that the Act does apply to those who like the plaintiff are carrying under special contract, and that the Act as so applied is valid. Appellee's brief contains the further statement (Brief, p. 4), that:

> "In court the plaintiff's counsel admitted that the Act was not applicable to a private carrier, and that if plaintiff was one 'he is entitled to the relief prayed for, that is, entitled to the temporary injunction, and later a permanent injunction."

Also that:

> "At the hearing on the order to show cause, counsel stated during the argument that the Act was not to be applied to common carriers."

Neither of these statements finds any support in the record.

The court, in its decision, (R. p. 28) assumed plaintiff to be a private carrier, and held that any provisions of the act so broad in their terms as to be applicable also to private carriers are foreign to the title of the act and fall under the condemnation of the Michigan constitutional requirements, but that these provisions are "independent of and separable from those that apply to common carriers, and their invalidity does not affect the remainder of the act."

The court found sections 3 and 7 of the act unconstitutional and, therefore, bad, but that the rest of the act was good. There is nothing in the opinion to indicate that the admission by some of the defendants that the act did not apply to those carrying under private contract had any influence upon the decision. Indeed the court could not have decided on that admission when one defendant averred that the act did apply to carriers under private contract. The only question for decision was that of constitutionality. If the act cannot under the provisions of the State Constitution apply to carriers under private contract, the plaintiff (assuming him to be a private carrier) was entitled to an injunction restraining its enforcement against him. If it does apply to such carriers, and is not invalid on general constitutional grounds, the injunction should have been denied.

Passing now to the general constitutionality of the act, appellee's brief discusses six propositions, numbered from 2 to 7. Of these in their order.

II.

The second proposition is that the act is discriminatory and invalid both under the Constitution of the United

States and that of the State of Michigan (Appellee's Brief, p. 5). The ground of invalidity asserted is in substance:

That by regulating the business only of those who transport for hire and over fixed routes the act discriminates in favor of those having no fixed routes and those who transport only their own goods, and that this is improper class legislation.

This proposition was discussed by the trial court in the fourth section of its opinion in the *Liberty Highway case* (R. pp. 34 and 35). The court concludes:

> "The statute is not class legislation because it applies only to common carriers operating over fixed routes. It is well known that commercial motor vehicle transportation and highway maintenance expense resulting therefrom, is rapidly increasing; that traffic on main highways is greatly congested. It is not an unreasonable classification under the police power to make a distinction between those common carriers whose use of the highways is more regular, and hence more frequent, and whose operation on the highways is attended with greater danger to life and property and greater damage to the highways, and those carriers whose use of the highways is only occasional and spasmodic. Such a distinction does not constitute an arbitrary discrimination, it being settled that every state of facts sufficient to sustain a classification which can be reasonably conceived of as having existed when the statute was enacted will be assumed by the Court."

Under the authorities it is clear that the present act makes no improper discrimination.

Northwestern Laundry Co. vs. City of DesMoines, 239 U. S. 486.

This was a bill to restrain the enforcement of a city ordinance making the emission of dense smoke in certain portions of the city a public nuisance. The ordinance in question was passed under a Statute which made the emission of dense smoke within the limits of cities of 65,000 inhabitants a nuisance. The court say, (p. 495), on the question of arbitrary classification:

> "The ordinance applies equally to all coming within its terms and the fact that other businesses might have been included does not make such arbitrary classification as annuls the legislation. Nor does it make classification illegal because certain cities are included and others omitted in the Statute."

Rast vs. Van Deman & Lewis, 240 U. S. 342.

This was an attack upon a Florida Statute imposing license taxes on merchants, including a higher tax upon merchants who offered to customers profit-sharing coupons and trading stamps. The act was sustained, and the court say (p. 357):

> "The difference between a business where coupons are used, even regarding their use as a means of advertising, and a business where they are not used, is pronounced. * * * * The legislation which regards the difference is not arbitrary within the rulings of the cases. It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it. * * * It makes no difference that

> the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."
>
> *Armour & Co. vs. North Dakota*, 240 U. S. 510.

The decision in this case sustained a North Dakota statute requiring lard not sold in bulk to be put in containers holding a specified number of pounds, net weight, or even multiples thereof, and so labeled. The Court say (p. 513):

> "If a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature and there is no impeachment of such estimate in differences of opinion, however, strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation, or certainly know them or be convinced of the wisdom or adequacy of the laws."

And again on page 516:

> "The equal protection clause of the Fourteenth Amendment is invoked by the Armour Company, and the specification is that the law under review 'arbitrarily and without reasonable ground therefor singles out lard from all food products which are sold in packages, such as 'prints of butter, packages of coffee, boxes of crackers, and the endless number of other products sold in package form are not included and no natural and reasonable ground for excluding them and singling out lard has been suggested.'

> The range of discretion that a State possesses in classifying objects of legislation we may be excused from expressing, in view of very recent decisions. The power may be determined by degrees of evil or exercised in cases where detriment is specially experienced. * * * The law of North Dakota does not exceed this power."

German Alliance Ins. Co. vs. Kansas, 233 U. S. 389.

A Kansas statute providing for the regulation of insurance companies was in this case sustained against the objection that it discriminated against other companies by exempting from its provisions farmers' mutual insurance companies organized under the laws of the State and insuring only farm property. (See pp. 417-18).

Chicago R. I. & P. Ry. Co. vs. Kansas, 219 U. S. 453.

This case sustains a statute regulating railroads which excepted railroads less than fifty miles in length. (See pp. 464-466).

Assaria State Bank vs. Dolley, 219 U. S. 121.

The Kansas Bank depositors guarantee fund act was sustained against the objection of improper discrimination based, among other things, upon the fact that depositors were given preference over other creditors, and that unincorporated banks and banks not having a surplus of ten per cent. went discriminated against. (pp. 126 and 127).

Engel vs. O'Malley, 219 U. S. 128.

In this case a New York statute forbidding individuals or partnerships to engage in the business of receiving deposits of money for safe keeping or for transmission to another country without a license from the State Comptroller was sustained against the objection of unconstitutional discrimination. The Act did not apply to corporations or bankers organized under the State banking law or to national banks, to express or telegraph companies or to individuals or partnerships where the average amount of each sum received in the ordinary course of business shall have been not less than $500 during the preceding fiscal year, nor to those who give bonds approved by the Comptroller. Commenting on this objection the Court say, (p. 138) that:

> "Legislation which regulates business may well make distinctions depending upon the degree of evil * * * It is true no doubt that where size is not an index to an admitted evil the law cannot discriminate between the great and small, but in this case size is an index. Where the average amount of each sum received is not less than $500 we know that we have not before us the class of ignorant, helpless depositors, largely foreign, whom the law seeks to protect."

Murphy vs. California, 225 U. S. 623.

Here an ordinance was sustained prohibiting the maintenance of billiard rooms, but excepting hotels having twenty-five bedrooms and upwards maintaining billiard tables for the use of regular guests only.

Williams vs. Arkansas, 217 U. S. 79.

Here a statute was sustained prohibiting drumming or soliciting for business on trains, for hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeons, and other medical practitioners. The Court quote with approval from the opinion of the State supreme court the statement that "the class of drummers or solicitors mentioned in the Act are doubtless the only ones who ply their vocation to any extent on railroad trains" (p. 90).

Terminal Taxicab Co. vs. District of Columbia, 241 U. S. 252.

It appeared by this case that the Public Utilities Act of the District of Columbia declared public utilities to include common carriers, and defined that as including express companies and every corporation controlling or managing any agency or agencies for the conveyance of persons or property within the District of Columbia for hire, with certain exception. Such companies were placed under the jurisdiction of the public utilities commission. The plaintiff (which contested the commission's jurisdiction) was in the business of carrying passengers and goods by automobiles and taxicabs, including the carriage of passengers between railroad terminals and hotels under contracts with the hotels, but limiting this service to hotel guests. The Court say (p. 255) that this limitation does not remove the public character of the service, and that neither its contract nor its public duty would allow the plaintiff arbitrarily to refuse to carry a guest upon demand. That the service affects so considerable a fraction of the public that it is public in the same sense in which any other may be called so. The Court say further on page 257 that complaint was made that jurisdiction has

not been assumed by the Commission in their orders over some concerns standing on the same footing as the plaintiff, as to which the Court say that the ground alleged by the Commission is that it did not consider that the omitted concerns did business of a sufficiently large volume to come within the meaning of the Act, and that there is nothing to impeach the good faith of the Commission or give the plaintiff just cause for complaint.

Barrett vs. Indiana, 229 U. S. 26.

Sustains a statute which regulated coal mines, including bituminous mines, but excluding block coal mines. The Court quotes with approval (p. 30) from a former decision the statement that before a court can interfere with legislative classification it must be able to say that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

McLean vs. Arkansas, 211 U. S. 539.

Sustains a statute regulating coal mines which exempted from regulation mines in which less than ten miners were employed.

Fifth Avenue Coach Co. vs. New York, 221 U. S. 467.

Plaintiff had operated stage lines upon Fifth Avenue in New York and had used the interior for the display of advertising signs for years, and later used the exterior of its stages for display advertising. It complained of a city ordinance prohibiting advertising wagons on the streets of the Borough of Manhattan, permitting however, the putting of business notices on ordinary business wag-

ons not used mainly or merely for advertising (pp. 478-480 and 482). The ordinance was sustained.

It sufficiently appears from the cases of *Engel vs. O'Malley*, 219 U. S. 128, and *Williams vs. Arkansas*, 217 U. S. 79, above cited, that size may be a proper basis of classification, and, therefore, the classes of traffic which produce an inconsiderable effect in the production of evils sought to be remedied (in this case, those having no fixed routes, and those transporting only their own goods), may be excepted from the operation of the statute without unconstitutional discrimination.

Appellee's brief upon this point cites (pp. 6 to 12) only certain cases from state courts. Of these one only requires notice. *Kellaher vs. Portland*, 57 Ore., 578. The city ordinance in that case was held invalid because, and only because it taxed animal drawn vehicles used by the owners thereof in their own business, and did not tax automobiles so used (see p. 584 of the opinion where the court say):

> "It is an arbitrary classification to say that an automobile used in the streets for the same purposes as those vehicles drawn by horses which are taxed shall pay no vehicle tax."

The Supreme Court of Michigan is in accord with the other courts upon whose decisions we rely.

> *Lundstrom vs. Township of Ellsworth*, 196 Mich. 502.

This case sustained an act relieving townships from liability for damage resulting from breakage of a bridge by any steam vehicle weighing over six tons. The act was

attacked as improper class legislation. The court say (pp. 508, 509):

> "Class legislation is unconstitutional only when shown to be unreasonable, arbitrary and capricious, * * * unless upon its face convincingly arbitrary, capricious and unreasonable, it is not for the courts to debate the policy and wisdom of such legislative treatment. It was early said by this court, and has been reiterated, that : 'In cases of doubt, every possible presumption, not clearly inconsistent with the language and subject-matter, is to be made in favor of the constitutionality of the act. ' "

III.

Appellee's third proposition (Brief, p. 13) is that Act 209 is a law impairing the obligation of contracts. The point made is that :

> **Inasmuch as the plaintiff has paid the license tax provided by the General Motor Vehicle Act (which act provides that such payment exempts the motor vehicle from all other taxation) a contract results which is violated by the imposition of the tax under the act here in question.**

Appellee's brief states (p. 14) that he complied with the requirements of the General Motor Vehicle Act, "Paying for his trucks taxes in the amount of approximately $4,100.00 for the license year January 1, 1923 to December 31, 1923." This statement is hardly warranted by the record, which contains nothing but the statement in paragraph 40 of plaintiff's bill of complaint (R. p. 15):

> "That plaintiff has complied with the provisions of the law of the State of Michigan relative to motor vehicles and the operation thereof and conspicu-

ously display (on their said motor equipment) their state license motor vehicle numbers."

Now, Act No. 128 of the Public Acts of 1923 (Public Acts, 1923, p. 188) amended section 7 of the Motor Vehicle Act (the original language of which, quoted on page 14 of Appellee's brief, and upon which he relies, is that the tax provided for shall be "All the lawful tax collectible on such motor vehicle, and shall exempt such motor vehicle from all other forms of taxation,") by adding after the words above quoted the following: "Except that the legislature may impose further and different specific taxes or privilege fees on certain classes of such motor vehicles." This amendatory act by its second section (see p. 189) "Is ordered to take immediate effect", and being approved May 10, 1923, took effect on that date.

Now Appellee's bill of complaint does not show that he paid his tax *before* May 10, 1923, and there is nothing in the record to show when he paid it. If he did not pay before May 10th, the exemption which he claims was taken away by the amendatory act which took effect upon that day, and which permitted the imposition of the privilege fee by the act here complained of. He is not in a position to claim that his payment made a contract.

Furthermore, by section 6 of the Motor Vehicle Act, it is provided (1 Mich. Comp. Laws, 1915, Sec. 4802): "All registrations under this act shall expire on December 31st of each year, and shall be renewed annually in the same manner and upon the payment of the same tax as provided in Section 7." The exemption from further taxation if acquired (on the assumption, not warranted by the record, that his tax was paid before May 10, 1923) expired December 31, 1923. It would in that case be true

that the privilege fee provided for by Act No. 209 could not be exacted from plaintiff for the year 1923, but, as his exemption is for the year only, he would be liable for the payment of that privilege fee for 1924, and for succeeding years should he continue in business. The act would not be unconstitutional as applied to plaintiff because of the existence of an exemption, for a limited time, from the payment of the privilege fee for which it provides.

IV.

Appellee's fourth and fifth propositions may be discussed together. They are that Act 209 deprives him of property without due process of law, and interferes with his liberty of contract. That is, (Appellee's Brief, pp. 19, 21 and 22) that

Because his entire business is the transportation of automobile bodies under special contracts with certain automobile manufacturers, he cannot be required, as by the act in question he is required, to carry for the public generally.

It appears by the bill of complaint and plaintiff's affidavit (Bill, par. 19, R. p. 3; Affidavit, R. p. 19) that the appellee's entire business is the transport of automobile bodies under special contracts. It does *not* appear there or elsewhere in the record, although it is asserted (Appellee's Brief, p. 22) that he "could not possibly carry for the public generally", and that "He has only the equipment necessary to carry for the output of these factories". For anything that appears in the record it may well be that his equipment is adequate for other transportation besides that called for by his existing contracts. Nor does the record show that even these contracts were made before Act No. 209 took effect.

Appellee's entire argument on this point is based on two propositions:

(a) That he has only the equipment necessary for the transportation required by these contracts.

(b) That if he be required to carry for the public generally, he cannot carry under the contracts.

The second proposition depends on the first, and that has no basis in the record. Nor is it true (see our original brief p. 18) that, if made a common carrier by law, plaintiff is obliged to abandon his existing contracts.

Furthermore even contract rights may be modified in the public interest under the police power.

Atlantic Coast Line vs. Goldsboro, 232 U. S. 548.

The Court say in this case (p. 558) that it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and all contract and property rights are held subject to its fair exercise.

Tanner vs. Little, 240 U. S. 369.

In this case a law prohibiting the use of trading stamps without the payment of a high license fee was sustained. It appeared that a number of the complainants had contracts running from one to five years now in force and which were in force at the passage of the Act, for the

use of a trading stamp advertising system; and that they had a large number of stamps upon which they will sustain a great and irreparable loss if they cannot dispose of them. (See p. 371). The license fee was admittedly prohibitive. (See pp. 380 and 386). The statute was sustained against the objection that it impaired the obligation of contracts.

Union Dry goods Co. vs. Georgia Public Service Corporation, 248 U. S. 372.

The State Railroad Commission, under statutory authority, made an order raising rates for supplying electricity by public service corporations to a point higher than provided in an unexpired contract made prior to the order. Held that the order was a valid exercise of police power.

The Court say, p. 375, "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court." After citing several cases in point, the opinion continues, quoting the case of *Railroad Company vs. McGuire*, 219 U. S. 549.

> "There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of

the community." After other citations, the opinion concludes:

> "These decisions, a few from many to like effect, should suffice to satisfy the most skeptical or belated investigator that the right of private contract must yield to the exigencies of the public welfare when determined in an appropriate manner by the authority of the State."

V.

Appellee's sixth proposition (Brief, p. 22) is that the act in question is in conflict with the commerce clause of the Federal Constitution:

Because the fee which it exacts is a direct tax on the privilege of engaging in interstate commerce; that the insurance requirement of section 7 is invalid for the same reason.

The objection to section 7 is sufficiently discussed in our original brief, pages 31 to 36.

The fee imposed by the act (see Sec. 8, set out in our original brief, p. 4) is not a tax on the privilege of engaging in interstate commerce. It is, in the language of Section 8, "a fee for the privilege of engaging in the business defined in Section 1 hereof." The business defined in Section 1 (see our original brief p. 2) is, "The business of transporting persons or property by motor vehicle for hire *upon or over the public highways of this state* over fixed routes or between fixed terminii." The user of the state highways is the essential element upon which the tax is based. It is not the business of transporting persons or property by motor vehicle for hire (whether in interstate or intrastate commerce) the privilege of doing which is taxed, but the user of public highways in such transportation.

There is urgent need in the interest of public safety and public convenience for the regulation of the use of the highways which the act seeks to regulate. The following cases sufficiently show that the provisions of the act are well within the limits of the police power of the state.

Hendrick vs. Maryland, 235 U. S. 610

In this suit the Maryland Motor Vehicle License Act was sustained. It provided that all motor vehicles should be licensed by a State official; provided for fees, to be used in the maintenance of State roads, and contained various other regulatory provisions. It was attacked as a regulation of interstate commerce. The Court say, (p. 622) that the movement of motor vehicles over highways is attended by constant and serious dangers to the public and is abnormally destructive to the ways themselves; that it is a proper subject for police regulation and that in the absence of national legislation a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation of all motor vehicles, including those moving in interstate commerce.

Kane vs. New Jersey, 242 U. S. 160.

This case sustained the New Jersey automobile license law which provided that every resident of the state and every non-resident whose automobile shall be driven in the state, shall before using it on the public highways register it and pay a specified fee which fees are to be used for the repair of the improved roads throughout the state.

The Court say (p. 167) that the power of the State to regulate the use of motor vehicles on its highways extends

to non-residents as well as to residents, and includes the right to exact reasonable compensation for special facilities afforded, as well as reasonable provisions to insure safety. On page 169 (stating that both the New Jersey and the Maryland Act contemplated that the excess fees collected over expenses should be applied to the maintenance of improved roads) the opinion quotes from *Hendrick vs. Maryland* the statement that the Act "was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential and whose operations over them are peculiarly injurious."

Mountain Timber Co. vs. Washington, 243 U. S. 219.

This case sustained a Workmen's Compensation Act which provided for the creation of a public fund for the indemnification of injured employees and their dependents by the compulsory contribution of employers in industries classified as extra hazardous. (See p. 229).

The Court say (p. 244) that "the Act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations," and that "the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed irrespective of the particular plant in which the accident might happen to occur. In short it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or

work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation."

They refer in support of this position to *Hendrick vs. Maryland* and *Kane vs. New Jersey* as sustaining laws framed to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. (See p. 245).

This question is discussed in the opinion of the trial court (R. pp. 32 and 33), with the citation of numerous authorities. The court holds that the fee provisions of the act are not in conflict with the Federal Constitution.

VI.

Appellee's seventh proposition (Brief, p. 23) is that Section 3 of Act 209 is too vague and uncertain to furnish a sufficiently definite standard of guilt. This proposition is sufficiently discussed in our original brief, pages 29 to 31.

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